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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

In Re:	
EDWARD JUNIOR GREEN,	**CASE NO. 00-40678-13**
	CHAPTER 13
DEBTOR.	
EDWARD JUNIOR GREEN,	
PLAINTIFF,	
v.	**ADV. NO. 00-7129**
KANSAS CITY POWER & LIGHT CO. and WORRY FREE SERVICE, INC.,	
DEFENDANTS.	

ORDER GRANTING SUMMARY JUDGMENT FOR PLAINTIFF

This proceeding is before the Court on opposing motions for summary judgment. The debtor-plaintiff appears by counsel Fred W. Schwinn of the Consumer Law Center, P.A. The defendants appear by counsel Joseph A. Rosa. The Court has reviewed the relevant pleadings and is now ready to rule.

The debtor contends that he entered into a transaction with the defendants in which they violated the Kansas Consumer Protection Act, K.S.A. 50-623, *et seq*. Specifically, the debtor claims that by attempting to disclaim and otherwise limit the implied warranties of merchantability and fitness for a particular purpose, the defendants committed one or more acts constituting unconscionable

practices. For the reasons stated below, the Court grants the debtor's motion and denies the defendants' motion.

FACTS

Worry Free Service, Inc. ("Worry Free"), is a wholly owned subsidiary of Kansas City Power & Light Company ("KCPL"). Worry Free enters into contracts with regional heating and cooling contractors to sell, install, and maintain home heating and cooling systems. KCPL and Worry Free finance the systems, obtaining them from manufacturers, who provide warranties on the systems. The contractors promise Worry Free that they will warrant their installation of the systems for at least one year, and their service and repair of the systems for at least sixty days. In appropriate situations, the contractors suggest to consumers who have hired them to repair or maintain their home systems that they might buy a new replacement system from KCPL and Worry Free. Based on the contract involved in this case, which indicates on the first page that the agreement was with KCPL and on the second page that it was with Worry Free, it appears that KCPL and Worry Free operate this program as some sort of joint venture. The Court will therefore refer to them jointly as "the Suppliers."

In July 1998, the debtor hired A-1 Cooling and Heating, Inc. ("A-1") to fix his air conditioner. A-1's repairman convinced the debtor to replace his furnace, coil, and condenser with units provided by the Suppliers ("the Worry Free Equipment" or "the Equipment") and installed by A-1, under an agreement with the Suppliers called a "Residential Worry Free Agreement." The manufacturer of the Worry Free Equipment, Nordyne, provided a six-year limited parts warranty to the "owner" from the date of purchase. To obtain warranty service from Nordyne, the "owner" must supply proof of the

date of purchase and of ownership. The debtor's agreement with the Suppliers, though, specifically stated that he did not own the Equipment, and also stated on the first page that he was leasing the Equipment from KCPL and on the second that he was leasing it from Worry Free.

According to the Residential Worry Free Agreement, the debtor leased the Worry Free Equipment for 84 months at a rate of $92.28 per month, and could not terminate the lease for any reason. His payment obligation totaled $7,751.52. At the end of the lease term, the debtor had the option to purchase the Equipment for $117.90. The author of this opinion (in an oral decision) and at least one other bankruptcy judge in this district (in a written decision) have previously ruled that, under Kansas law, other Worry Free "leases" with provisions similar to these were not true leases, but instead were disguised security agreements. *See In re Thomas*, Case No. 99-22939-7, Memorandum Opinion and Order Granting in Part and Denying in Part Debtor's Motion for Summary Judgment (Bankr.D.Kan. Mar. 13, 2001) (Robinson, J.). The Court is convinced this "lease" is also a disguised security agreement, and so will hereafter refer to it as "the Sale Agreement." The Suppliers also had the debtor sign another relevant agreement at the same time as the Sale Agreement; this one was called "Residential Worry Free Consumer Leasing Act Disclosures." It will be referred to as "the Disclosure."

Along with such sales of heating and cooling systems, the Suppliers also offer to sell consumers service agreements under which a Worry Free contractor like A-1 will provide parts, service, and semi-annual maintenance for the systems for periods of up to 15 years. The debtor in this case bought such a service agreement ("the Service Agreement") at a cost of $21.95 per month plus tax. The debtor could terminate the Service Agreement on thirty-days' notice. A-1 purportedly advised the

debtor, in general terms, of warranty protection he would receive from A-1 and Nordyne, as well as under the Service Agreement. However, the affidavit that is said to document this advice, although referenced in the Suppliers' briefs, was not attached to the briefs or otherwise supplied. No copy of the Service Agreement has been provided, either, although the Sale Agreement contains a paragraph that describes at least some of the services the debtor would be entitled to under the Service Agreement.

The parties' dispute revolves around certain provisions in the Sale Agreement and the Disclosure. In the Sale Agreement, the relevant provisions are identified as paragraphs I and L. Appearing on a page largely filled with tightly-spaced text in a smaller-than-normal font, and capitalized as reproduced here, they read:

> I. Limitation of Liability. Any warranties with respect to the Worry Free Equipment are solely extended by the manufacturer of the Worry Free Equipment. Worry Free Service, Inc. (or its successors or assigns) makes no representation or warranties, whether written, oral or implied with respect to this Agreement. As between Customer and Worry Free Service, Inc. (or its successors or assigns), execution by Customer of this Agreement and the Certificate of Acceptance shall be conclusive proof of the compliance of the Worry Free Equipment with all requirements of this Agreement and Worry Free Service, Inc. leases and Customer takes the Worry Free Equipment and each part thereof "AS IS" and WORRY FREE SERVICE, INC. SHALL NOT BE DEEMED TO HAVE MADE, AND WORRY FREE SERVICE, INC. (AND ITS SUCCESSORS AND ASSIGNS) HEREBY DISCLAIMS, ANY REPRESENTATION OR WARRANTY, EITHER EXPRESS OR IMPLIED, AS TO ANY MATTER WHATSOEVER, INCLUDING WITHOUT LIMITATION THE DESIGN OR CONDITION OF THE WORRY FREE EQUIPMENT OR ANY PART THEREOF, THE MERCHANTABILITY THEREOF OR THE FITNESS THEREOF FOR ANY PARTICULAR PURPOSE, TITLE TO THE WORRY FREE EQUIPMENT, THE QUALITY OF THE MATERIALS OR WORKMANSHIP THEREOF, OR CONFORMITY THEREOF TO SPECIFICATIONS, OR THE PRESENCE OR ABSENCE OF ANY LATENT OR OTHER DEFECTS, WHETHER OR NOT DISCOVERABLE. THERE IS NO WARRANTY THAT (A) THE WORRY FREE EQUIPMENT IS DELIVERED FREE OF THE RIGHTFUL CLAIM OF ANY PERSON BY WAY OF INFRINGEMENT OR THE LIKE, OR (B) FOR THE LEASE TERM NO

PERSON HOLDS THE CLAIM TO OR INTEREST IN THE WORRY FREE EQUIPMENT THAT AROSE FROM AN ACT OR OMISSION OF WORRY FREE SERVICE, INC. WHICH WILL INTERFERE WITH THE CUSTOMER'S ENJOYMENT OF ITS LEASEHOLD INTEREST. WORRY FREE SERVICE, INC. WILL NOT BE RESPONSIBLE FOR CONSEQUENTIAL, INDIRECT OR DIRECT DAMAGES, INJURY OR ILLNESS OF ANY KIND OR NATURE. Customer agrees to indemnify and hold harmless Worry Free Service, Inc. and its contractors from any liability and expenses, including attorney's fees and expenses, arising out of or relating to equipment provided under this Agreement.

. . . .

L. Miscellaneous. The Agreement shall be governed by the laws of the state where the Premises are located. In the event personal property tax is assessed against the Worry Free Equipment during the Term, Customer shall pay said tax. The Agreement may be modified only in a writing signed by both parties. Worry Free Service, Inc. and Customer intend this Agreement, along with the Worry Free Consumer Leasing Act Disclosure provided in connection herewith (the "Disclosure") to be a final expression and a complete and exclusive statement of the terms of their agreement. The Agreement supersedes all prior agreements and understandings, whether written or oral, relating to the subject matter of the Agreement, and there are no representations or warranties of any kind or nature except as expressly set forth herein. No delay or omission by either party in exercising any right under this Agreement shall operate as a waiver of that or any other right. The headings in the Agreement are for convenience only and do not define the rights and duties of the parties. If any provision of the Agreement is invalid, such provision shall be deemed omitted, but the remaining provisions of the Agreement shall be given full force and effect.

The Disclosure also contains the following relevant paragraphs:

Maintenance. You are responsible for all maintenance, service and repair of the leased property. You may meet this maintenance, service and repair obligation by entering into a separate maintenance and service agreement. You are also responsible for damages to or loss of the leased property during the term of the lease.

Warranties. All warranties regarding the leased property are made solely by the manufacturer of the leased property. KCPL makes no warranties of any kind or nature, express or implied, regarding the leased equipment and specifically disclaims all implied warranties including merchantability and fitness for a particular purpose.

Unlike the Sale Agreement, the Disclosure does not say anything about what law governs it, although it does refer to a "Regulation M," without further explaining what that might be. In addition to the provision in the Sale Agreement that it is governed by the law of the state where the "Premises" (identified as the debtor's residence) are located, the Court notes that the various agreements were all entered into in Kansas between a Kansas resident and companies authorized to do and doing business in Kansas, and concerned the installation, maintenance, and service of Worry Free Equipment in a residence located in Topeka, Kansas.

DISCUSSION

The debtor contends that the Suppliers violated the Kansas Consumer Protection Act, K.S.A. 50-623, *et seq*. ("KCPA"), by trying to disclaim the implied warranties of merchantability and fitness for a particular purpose, and also by trying to exclude any remedy provided by law for a breach of either of these implied warranties. The Suppliers do not contest certain elements of the debtor's claims under the KCPA, namely that: (1) the debtor bought the Worry Free Equipment as a "consumer"; (2) the Suppliers were "suppliers" of the Equipment; and (3) the parties' transaction was a "consumer transaction" covered by the KCPA. A review of the KCPA's definitions of these terms makes clear that these concessions were wisely made. *See* K.S.A. 50-624(b), (c), & (i).

Section 50-639(a) of the KCPA provides:

> Notwithstanding any other provision of law, with respect to property which is the subject of or is intended to become the subject of a consumer transaction in this state, no supplier shall:

> (1) Exclude, modify or otherwise attempt to limit the implied warranties of merchantability as defined in K.S.A. 84-2-314, and amendments thereto, and fitness for a particular purpose, as defined in K.S.A. 84-2-315, and amendments thereto; or
>
> (2) exclude, modify or attempt to limit any remedy provided by law, including the measure of damages available, for a breach of implied warranty of merchantability and fitness for a particular purpose.

K.S.A. 2000 Supp. 50-639(a).[1] Subsection (e) of the same statute adds that "A disclaimer or limitation in violation of this section is void." K.S.A. 2000 Supp. 50-639(e).

Despite the unqualified disclaimers expressed in all capital letters in paragraph I of the Sale Agreement and essentially repeated in the Disclosure, the Suppliers argue that the first and last sentences of paragraph L—"The Agreement shall be governed by the laws of the state where the Premises are located" and "If any provision of the Agreement is invalid, such provision shall be deemed omitted, but the remaining provisions of the Agreement shall be given full force and effect"—provided notice to the debtor that Kansas law might void the disclaimers, and therefore prevented the disclaimers from constituting a violation of the KCPA. They also point out that paragraph L mentions warranties, suggesting that this adds somehow to the alleged notice to the debtor; in fact, the fifth sentence includes the statement, "there are no representations or warranties of any kind or nature except as expressly set forth herein." To support this argument, the Suppliers rely on *Tufts v. Newmar Corp.*, 53 F.Supp. 2d 1171, 1180-81 (D.Kan. 1999). The attempted disclaimers in that case, however, were very different

[1]An exception to this rule is available when the supplier can prove that the consumer knew of defects in the property and that the defects were the basis of the parties' agreement, *see* K.S.A. 2000 Supp. 50-639(c), but the Suppliers do not rely on it here. Indeed, for new merchandise such as the Worry Free Equipment involved here, the exception would rarely, if ever, be available.

from the ones contained in the Sale Agreement and the Disclosure. In *Tufts*, a recreational vehicle dealer's contract included the following provision:

> Exclusion of Warranties. I understand that the implied warranties of merchantability and fitness for a particular purpose and all other warranties expressed or implied are excluded by you from this transaction and shall not apply to the goods sold. I understand that you make no warranties whatsoever regarding the unit or any appliance or component contained therein, except as may be required under applicable state law.

53 F.Supp. 2d at 1181. The RV manufacturer's warranty said:

> Any implied warranties as to the . . . recreational vehicle including any warranty of merchantability or fitness for a particular purpose are limited to a period of twelve (12) months immediately following the date of purchase as heretofore stipulated. Some states do not allow limitations on how long an implied warranty lasts, so the above limitations may not apply to you.

Id. Under these provisions, the consumer was clearly warned, as a part of each disclaimer, that applicable state law might prevent not just some unspecified part of the contract, but the disclaimer itself in particular from being effective.

Two other decisions cited in *Tufts* involved lease agreements from one leasing company that also contained warranty disclaimers but were stamped on the front with the following provision:

> NOTICE TO CERTAIN KANSAS LESSEES--Notwithstanding the terms hereof, to the extent prohibited by Kansas law, no exclusion, modification, or limitation herein of any implied warranty of merchantability or fitness for a particular purpose otherwise applicable to this transaction or any remedy provided lessee by law, including the measure of damages, shall apply to a lease made within the State of Kansas where lessee is a natural person or sole proprietorship.

Wight v. Agristor Leasing, 652 F.Supp. 1000, 1011 (D.Kan. 1987) (Saffels, J.); *Agristor Leasing v. Meuli*, 634 F.Supp. 1208, 1212 (D.Kan. 1986) (Kelly, J.). Not surprisingly, both courts held that this provision eliminated any otherwise illegal warranty disclaimers from the agreements. 652 F.Supp.

at 1011; 634 F.Supp. at 1218-19. Under these agreements, Kansas lessees were warned that the warranty disclaimers not only might not be, but actually were not part of their contracts.

Nothing in the Suppliers' Sale Agreement, by contrast, alerted the debtor that the warranty disclaimers in particular might be ineffective under Kansas law. Certainly, the general statement that Kansas law applied because that was where the debtor's residence was located gave no such warning. Furthermore, the main thrust of the last sentence of paragraph L was not to advise the debtor that any provision in the contract might be invalid, but instead to advise him that the rest of the contract would remain in effect even if any unspecified part of it might be invalid. In fact, the only clear reference to warranties in paragraph L essentially repeats paragraph I's assertion that no warranties were being made. The Disclosure again repeats that no warranties were being made, specifically referring to the implied warranties of merchantability or fitness for a particular purpose. The Court concludes that paragraph I of the Sale Agreement and the "Warranties" paragraph of the Disclosure violate the KCPA's prohibition against such disclaimers. The general statements that Kansas law applies and that the invalidity of any provision does not affect the validity of the rest of the contract simply do not warn consumers that the warranty disclaimers either might be or are invalid under Kansas law, and cannot protect the Suppliers from liability for the improper disclaimers as the language in the *Tufts* and *Agristor* cases did.

The Court notes that regulations implementing the Magnuson-Moss Warranty Act, 15 U.S.C.A. §2301, *et seq*., provide further support for the Court's conclusion that the Sale Agreement did not adequately advise the debtor of even the possibility that Kansas law might render the warranty disclaimers invalid. Under that Act, the Federal Trade Commission has directed that a written warranty

must use "simple and readily understood language." 16 C.F.R. §701.3(a). If a written warranty tries to limit the duration of implied warranties or to exclude or limit warranty protection for certain types of damages, the FTC requires the warranty to specifically declare that some states do not allow such limitations or exclusions, "so the above limitation may not apply to you," or "the above limitation or exclusion may not apply to you." 16 C.F.R. §701.3(a)(7) & (8). The FTC also requires a written warranty to say: "This warranty gives you specific legal rights, and you may also have other rights which vary from state to state." *Id*. at §701.3(a)(9). If the language relied on by the Suppliers was truly intended to provide similar types of warnings, it fell woefully short of the mark.

The Suppliers also suggest that because the debtor demanded recovery for violations of K.S.A. 50-627(b)(7) in his complaint, the Court may not instead award recovery for violations of K.S.A. 2000 Supp. 50-639(a). However, Federal Rule of Civil Procedure 54(c), made applicable here by Federal Rule of Bankruptcy Procedure 7054(a), provides that, except in default judgment cases, the Court may award whatever relief the debtor has shown himself to be entitled to, without regard to the terms of his demand for judgment. *See Hamill v. Maryland Cas. Co.*, 209 F.2d 338, 340 (10th Cir. 1954) (plaintiff may recover on any theory legally sustainable under established facts, regardless of demand in pleadings); *Schoonover v. Schoonover*, 172 F.2d 526, 530 (10th Cir. 1949) (prayer for reliefs forms no part of cause of action, and pleader is entitled to relief made out by case without regard to prayer); 10 Wright, Miller & Kane, *Fed. Prac. & Pro. Civ. 3d*, §2664 at 173-74 (1998) (in nondefault cases, court's duty to grant relief to which prevailing party is entitled overrides legal theories suggested in pleadings); *see also* 5 Wright & Miller, *Fed. Prac. & Pro. Civ. 2d*, §1255 at 369 (1990) (demand for relief required under Civil Rule 8(a)(3) does not limit relief court can award). The debtor clearly

alleged in his complaint that the Suppliers had made improper warranty disclaimers, giving them notice that the validity of the disclaimers would be at issue in the case. Although the improper disclaimer of warranties is listed in 50-627(b) as a circumstance to consider in determining the unconscionability of an act or practice, 50-639(a) directly prohibits the disclaimers made in the Sale Agreement and Disclosure, and K.S.A. 50-634(b) and 50-636(a) authorize a consumer aggrieved by any violation of the KCPA to recover the greater of either his damages or a civil penalty of up to $5,000. Thus, the Court's conclusion that the warranty disclaimers violated the KCPA makes it unnecessary for the Court to determine whether they also constituted an unconscionable act or practice.

In passing, the Court feels compelled to comment on the extreme adhesion nature of the Suppliers' Sale Agreement and Disclosure. Besides illegally disclaiming the warranties of merchantability and fitness for a particular purpose, the agreements were otherwise worded and structured to take advantage of unsophisticated consumers. Even though legally, the transaction was clearly a sale of the Worry Free Equipment, the Sale Agreement called it a lease, increasing the odds that a consumer, not knowing he or she was actually the owner of the Equipment and protected by warranties, would purchase a Service Agreement rather than rely on warranty protection like Nordyne's that is provided only to the "owner." This facet of the Sale Agreement is reinforced by the "Maintenance" paragraph in the Disclosure, which declares that the consumer is responsible for all maintenance and service on the Equipment, but can satisfy this obligation by entering into a separate agreement like the Service Agreement. The Sale Agreement declared that the consumer must make all the payments due under the agreement even if the Worry Free Equipment was defective, damaged, or destroyed, and could not avoid any payment obligation for any reason. It appears, for example, to

mean the consumer must pay even if defective Equipment blew up and destroyed the consumer's home. Somehow, the consumer was required to make the payments even if the Agreement was unenforceable; the Court has difficulty imagining how the Suppliers' planned to enforce this provision. Instead of being relieved of payment obligations if it turned out the Worry Free Equipment was defective or unsatisfactory for any other reason, the consumer was also said to agree to indemnify the Suppliers and their contractors for any liability and expenses that might arise out of or related to the Equipment, apparently even if the liability and expenses were caused by defects in the Equipment. In addition to disclaiming the implied warranty of merchantability that the Equipment would be fit for the ordinary purposes for which it was designed—in this case, heating and cooling the consumer's home—the Suppliers even refused to warrant that the consumer would receive good title to the Equipment once he or she finished paying for it. Given these one-sided, overreaching provisions, the Court finds it difficult to maintain any hope that the Suppliers had any true desire to alert their customers that the warranty disclaimers might be invalid under Kansas law.

The debtor contends that the Suppliers committed four separate KCPA violations in their transaction with him by: (1) disclaiming the implied warranty of merchantability; (2) disclaiming the implied warranty of fitness for a particular purpose; (3) attempting to exclude or limit the remedies for a breach of the implied warranty of merchantability; and (4) attempting to exclude or limit the remedies for a breach of the implied warranty of fitness for a particular purpose. He asks the Court to award him the maximum civil penalty for each of these allegedly distinct violations. This claim draws some support from KCPA §50-636(a), which authorizes the imposition of a civil penalty "for each violation" of the KCPA. However, the Court believes these four matters are so closely related that they are more

properly viewed as a single violation. Certainly, an attorney trying to protect the Suppliers from warranty liability (and acting without knowledge of the KCPA) would be likely to include all four items in a contract, not just one or two of them. Even if it might be correct to view each of the provisions as a separate violation of the KCPA, the Court believes that their close relationship would justify limiting the penalty imposed to no more than the maximum available for a single violation. Still, considering all the circumstances of the transaction, the Court concludes it is appropriate to impose a $5,000 civil penalty in this case. Given their joint involvement in the transaction, the Court further concludes that KCPL and Worry Free should be jointly and severally liable for the payment of this penalty.

For these reasons, the Court grants the debtor's motion for summary judgment on the issue of liability, and denies the Suppliers' motion. The debtor is granted judgment for $5,000 against KCPL and Worry Free, jointly and severally. Although attorney fees and costs pursuant to K.S.A. 50-634(e) were requested in the complaint, they have not been mentioned in the summary judgment motions, and so will not be addressed by the Court at this time.

IT IS SO ORDERED.

Dated at Topeka, Kansas, this _____ day of September, 2001.

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JAMES A. PUSATERI
CHIEF BANKRUPTCY JUDGE